UNITED MALAYAN BANKING CORP. BHD.

v.

MIDEAST DEVELOPMENT SDN. BHD. & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[CIVIL SUIT NO. 149 OF 1981]
31 JANUARY 1990

CIVIL PROCEDURE: *Interest on post-judgment debt - Judgment delivered in 1981 prior to 1986 amendment - Higher than interest stated in guarantee document.*

The 2nd and 3rd defendants were joint and several guarantors for the repayment of a loan granted to the 1st defendant. The 1st defendant defaulted in repayment. The plaintiff claimed the monies owing and obtained judgment in default on 16 December 1981. The 2nd defendant now applies to set aside the default judgment arguing that the 15% interest on judgment (as ordered by the Court) was not in accordance with the 12% stated in the guarantee document and in the alternative, the interest of 15% should be paid only up to the date of judgment, thereafter the rate was 8% per annum.

Held:

[1] Since this judgment was obtained prior to the 1986 amendment, the law governing interest on post-judgment debt is contained in *Malayan United Bank Bhd. v. Mohd. Yusof.* Order 42 r. 12 of the RHC 1980 applied pre-1986, a judgment allowing interest more than 8% p.a. from judgment to realisation is irregular as it infringed that order.

[2] Since the plaintiff had entered judgment at an interest rate greater than 8%, the 2nd defendant has a right *ex debito justitiae* to have the judgment set aside; the question of delay no longer becomes relevant since there should not have been such judgment in the first place.

[3] Apart from entry of increase of 15% in the borrower's statement of account, the plaintiff has not been able to procure the requisite notice informing the 1st defendant of the increase, as is provided for in the guarantee, therefore the applicant has a plausible defence to this action.

[Default judgment set aside.]

Cases referred to:

Malayan United Bank Bhd. v. Mohammed Salleh bin Mohammed Yusoff & Ors. [1988] 1 CLJ (Rep) 762
Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] CLJ (Rep) 349
Malaysia Building Society Bhd. v. Lim Kheng Kim & Ors. [1988] 1 CLJ (Rep) 770
Hughes v. Justin [1894] 1 QB 667

For applicant/defendant - Balwant Singh Sidhu; M/s. Balwant Singh Sidhu & Co.
For respondent/plaintiff - Tan Hock Kim; M/s. Tan & Tan

JUDGMENT

Abu Mansor Ali J:

The second defendant in this suit applied for the setting aside of the judgment in default of defence entered against him on 16 December 1981 (the judgment) and if he succeeds he applies for the other consequential orders granting time to him to file his memorandum of appearance and stay of all the proceedings pending this application and costs.

The facts of the case are as follows. The 2nd defendant together with the third defendant on 12 October 1979 became joint and several guarantors for the repayment of a loan granted to the 1st defendant. The first defendant defaulted in repayment and was in arrears of some RM150,920.37 The plaintiff bank then brought an action against all the three defendants claiming the sum of RM154,467.91 with interest thereon at the rate of 15% per annum from 26 May 1981 on a monthly rests calculated on a daily basis until full payment or realisation.

When the three defendants defaulted in entering their defence, judgment was entered against them on 16 December 1981. By the 2nd defendant's summons-in-chambers dated 26 April 1988 subsequently as amended and redated the 8 January 1989 he applied to have the said judgment set aside.

Mr. Balwant Singh on behalf of the 2nd defendant while referring us to paras. 3 and 4 of the affidavit the 2nd defendant affirmed on 13 January 1989 contended that the said judgment, which carries interest at 15% per annum from 26 May 1981 calculated on a daily basis from judgment until payment was wrong as the guarantee on which the claim was based carried interest at 12% per annum on the outstanding balance. He also contended that under the contract of guarantee before there can be variation there should be a notice and there was no such notice other than entry of increase of 15% interest in the borrower's statement of account. He also contended that assuming that the 15% interest were correct it should only be up to the date of the judgment and it can only carry 8% per annum thereafter. The issue, he said, before the Court is whether the said judgment carrying that interest should be allowed to stand.

He submitted that the said judgment was before 12 December 1986 amendment. Allowing more than 8% per annum interest after judgment is only permitted after that amendment if there is a contractual agreement providing for that. He submitted the Court had no jurisdiction to grant an interest of more than 8% per annum. Since the Court did not have jurisdiction to give such interest he submitted that judgment ought to be set aside. For the proposition that the Court lacked jurisdiction he cited *Malayan United Bank Bhd. v. Mohammed Salleh bin Mohammed Yusoff & Ors.* [1988] 1 CLJ (Rep) 762 where Zakaria Yatim J allowed an application to set aside the judgment in default entered on 29 November 1985 since the old rule then in force was that a plaintiff cannot claim, from the date of judgment, that interest rate as agreed if such rate is more than 8% per annum. Counsel also referred the Court to p. 767 of the Malayan United Bank Bhd's case where the learned Judge said:

> Since the respondent had entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% pa, the applicant has a right *ex debito justitiae* to have the judgment set aside.

If the Court agreed, that the 2nd defendant has that right then the question of delay, he submitted, is irrelevant.

In support he also cited *Supreme Finance (M) Bhd. v. Koo Sin Ken* [1987] CLJ (Rep) 349 which the learned Judge quoted with approval.

Mr. Tan for the respondent in reply contended that there can be interest of 15% per annum and in this case he contended it can continue after the date of judgment. He cannot agree that interest should be 8% per annum from the date of judgment. He elaborated that interest can be more than 8% after judgment if the contract between the parties allows that to be so and it is so stated in the contract. He cited the case of *Malaysia Building Society Bhd. v. Lim Kheng Kim & Ors.* [1988] 1 CLJ (Rep) 770 where Edgar J dismissed a similar application to set aside the judgment obtained in default of appearance holding that the covenant for

the payment of interest was not merely ancillary to but was an independent covenant and was not extinguished in the judgment (dated 18 March 1986), the doctrine of merger being inapplicable.

What I must decide here firstly is the issue of the post-judgment debt. Is the judgment entered giving interest until realisation permissible having regard to it being a judgment prior to the PU (A) 445 amendment dated 29 October 1986?

After having considered the authorities placed before me, I find the applicant's application to have the judgment set aside on the ground that the plaintiff is not permitted to have interest more than 8% per annum to have merit. The facts of this case and the facts of the *Malayan United Bank Bhd. v. Mohammed Salleh bin Mohammed Yusoff's* case and those in the *Malaysia Building Society Bhd. v. Lim Kheng Kim's* case are similar wherein each guarantor signed a joint and several guarantee and indemnity to secure performance by a borrower. With respect I am unable to accept the judgment of Edgar J in the *Malaysia Building Society Bhd. v. Lim Kheng Kim's* case. He said whether post judgment interest is permitted would depend on whether the interest provision is contained in an independent covenant of the contract of guarantee. The learned Judge then made an admirable survey of the relevant cases which showed that post-judgment interest is permissible if the contract provided for an independent covenant and the cases showed that it is not extinguished by the judgment. With respect that may well be the supporting authority but I cannot help asking myself what was the law governing such interest pre the 1986 amendment? With respect the answer I get is that the judgment of Dato' Zakaria J in *Malayan United Bank Bhd. v. Mohammed Yusoff* has, in my view, placed correctly the law applicable at that time regarding interest. Under O. 42 r. 12 applicable then the judgment allowing interest more than 8% per annum from judgment to realisation is irregular as it infringed that order. I also agree, with respect, with Dato' Zakaria J's decision where he approved *Hughes v. Justin* [1894] 1 QB 667 at p. 767 of his judgment that since the respondent had entered judgment with the rate of interest after the date of judgment far in excess of the statutory rate of 8% per annum the 2nd defendant/applicant has a right *ex debito justitiae* to have the judgment set aside. Since that is my decision the question of delay no longer, in my view becomes relevant since there should not have been such judgment in the first place.

The other matter that I have to consider before the 2nd defendant can succeed in having the in default of defence judgment set aside is the question whether the 2nd defendant has a defence to this action. It is clear from the submission of the Counsel for 2nd defendant and the term of the contract of guarantee and indemnity that a written notice has to be given to the 2nd defendant before the rate of interest can be varied. What the respondent had shown was that there was a statement of account belonging to the 1st defendant borrower showing the interest having been increased to 15% but the respondent had not been able to produce a notice as such informing the respondent of the increase which is a term of the guarantee. Assuming that this is so and the 2nd defendant's allegation that he was given no notice is correct it will form part of his defence deserving consideration by the trial Court. I therefore rule that he has a plausible defence to this action.

For reason given, I allow the application of the 2nd defendant subject to him paying all costs in any event thrown away or incurred by the respondent plaintiff up to the stage in pursuing his claim including solicitor and client costs such costs to be taxed by a proper officer of the Court.

I also give an order in terms of the other consequential prayers prayed for by the 2nd defendant applicant, such orders only taking effect after settlement in full by him of all taxed costs with liberty to respondent to apply in the event of default by 2nd defendant in complying or the carrying out of the terms hereby granted to him to defend this action.

Also found at [1990] 2 CLJ 867